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No. 81-2332

In the Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, ETC., PETITIONER

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether respondent Chesapeake and Potomac Telephone Company of Virginia, a public utility created under the laws of Virginia, is a "displaced person" within the meaning of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, when it seeks reimbursement for the cost of removing its telephone lines and related equipment from former public rights-of-way in the execution of an urban renewal project funded in part by grants from the Department of Housing and Urban Development.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Secretary of Housing and Urban Development, a defendant-appellee below, is a respondent in this Court. However, as used in this brief, "respondent" refers to the C & P Telephone Company of Virginia.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 674 F.2d 298. The opinion of the district court (Pet. App. B-1 to B-12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1982. The petition for a writ of certiorari was filed on June 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, provides in pertinent part:

Section 4601:

* * * * *

(5) The term "person" means any individual, partnership, corporation, or association.

(6) The term "displaced person" means any person who * * * moves his personal property from real property, as a result of the acquisition of such real property * * * or as the result of the written order of the acquiring agency to vacate such real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance * * *.

(7) The term "business" means any lawful activity, excepting a farm operation, conducted primarily—

* * * * *

(B) for the sale of services to the public[.]

* * * * *

Section 4621:

The purpose of this subchapter is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

Section 4622(a):

Whenever the acquisition of real property for a program or project * * * will result in the displacement of any person * * * the head of such agency shall make a payment to any displaced person * * * for—

> (1) actual reasonable expenses in moving himself, his family, business * * * or other personal property[.]
>
> * * * * *

Section 4637:

> A person who moves or discontinues his business, or moves other personal property * * * as a direct result of any project or program * * * shall * * * be deemed to have been displaced as the result of the acquisition of real property.

STATEMENT

Respondent C & P Telephone Company of Virginia brought suit in the United States District Court for the Eastern District of Virginia against the Secretary of Housing and Urban Development and petitioner Norfolk Redevelopment and Housing Authority seeking reimbursement for the relocation of its telephone lines, cables, conduits, poles, and related equipment, which was necessitated by four federally-aided redevelopment projects in Norfolk, Virginia. The basis for respondent's claim was the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, which provides that "[w]henever the acquisition of real property for a [federally assisted] project * * * will result in the displacement of any [individual or corporation]," the state agency shall pay for the "actual reasonable expenses in moving [the individual's or the corporation's] personal property * * *." 42 U.S.C. 4622(a)(1) and 4601(5).

The district court denied relief, holding that public utilities were not included within the reimbursement provisions of the Act (Pet. App. B-1 to B-12). The court based its conclusion on the common law rule that utilities are not entitled to reimbursement when they are directed by public authorities to remove their property from public ways on

which they have been given revocable easements. The court could find nothing in the Act or its legislative history indicating that Congress intended to abrogate this "well known common law princip[le] * * *" (*id.* at B-8 to B-9). In addition, the court pointed out (*id.* at B-10) that public utilities are distinguishable from other businesses because utilities "retrieve their operating costs and the reasonable return on their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses."

The court of appeals reversed and remanded for further proceedings (Pet. App. A-1 to A-14). First, the court rejected the common law argument, noting that "[t]he Act was intended to create rights that were not recognized at common law" (*id.* at A-5 to A-6). Furthermore, the court pointed out that "Congress' failure to mention utilities during the debates on the Act and in the legislative history * * * provides little reason to exclude utilities from the Act's coverage," because "the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose" (*id.* at A-6 to A-7). The court found that the literal language of the Act would apply "[i]n the absence of any clear legislative intent to exclude utilities * * *" (*id.* at A-7).

Although the removal technically was required by the city's closure of the streets (in furtherance of the project), the court of appeals rejected petitioner's factual argument that the removal of telephone lines by respondent was not the result of petitioner's acquisition of real estate (Pet. App. A-8).

Finally, the court of appeals held that the telephone lines and equipment were reimbursable personal property rather than nonreimbursable real property: "C&P, in placing its

lines, could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners" (Pet. App. A-11). "Indeed, everyone recognized C&P's right of removal of property which could only have been its personalty" (*id.* at A-12). The court noted that "[i]n similar situations in which a utility's facilities were installed or attached to real estate belonging to others, state courts have found that the facilities remained personal property" (*ibid.*). The court of appeals remanded the case to the district court for a determination of damages.[1]

ARGUMENT

The decision of the court of appeals is a reasonable construction of the Uniform Relocation Act and does not conflict with the decision of any federal court of appeals or any state supreme court. Accordingly, review by this Court is not warranted.

1. Although the Secretary of HUD defended the judgment of the district court before the court of appeals, we believe that the court of appeals' interpretation of the Act is a reasonable one. The language of the Act certainly is broad enough to include utilities forced to relocate their equipment, and in the absence of compelling legislative history indicating an intent to exclude from the Act one form of business, the language should control. The primary purpose

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[1]Certain of the removal expenses were incurred with respect to lines in streets that were to be widened, and others in streets that were to be only partially closed. The court of appeals directed the district court to consider on remand whether those expenses were covered by the Act (Pet. App. A-10). Petitioner contends (Pet. 7) that respondent was obliged by its franchise agreement with the City of Norfolk to remove its equipment from public streets "without charge." Nothing in the court of appeals' opinion would appear to prohibit the district court from considering, on remand, whether respondent's right to payment under the Act is barred by contract.

of the Act was "to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of * * * federally assisted programs * * *." 42 U.S.C. 4621. See *Alexander* v. *HUD*, 441 U.S. 39, 51 (1979). The court of appeals' construction furthers uniformity for programs covered by the Act.[2]

Moreover, it cannot be said that the result is unreasonable. Because we are dealing with regulated public utilities, the ultimate question in this case is whether relocation costs are to be borne by the utilities' customers or by the taxpayers. (The two groups do not always coincide.) It is reasonable to include all the expenses of redevelopment projects in the cost of the project itself, rather than to pass along some of these expenses to the utility's customers, in what amounts to a hidden tax.

Neither petitioner nor the numerous amici have been able to produce any legislative history that specifically indicates a congressional intent to exclude utilities from the broad definition of the Act, and we are aware of none.[3] Under

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[2]Utilities may be treated differently under programs not covered by the Act; for example, amicus curiae City of Boise, Idaho, points out (Br. 29) that the Act left in effect 23 U.S.C. 123(a), which prohibits federal compensation for utility relocation expenses occasioned by highway improvement projects where state reimbursement is prohibited by state law. But that is no reason to deviate from uniformity in programs that *are* covered by the Act.

[3]The enactment by Congress two years later of the District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-496, 86 Stat. 812, amending D.C. Code Ann § 5-704 (1967) does not, as suggested by petitioner (Pet. 16), necessarily indicate that Congress believed that utilities were excluded from the reimbursement provisions of the Act. Indeed, the District of Columbia statute indicates that Congress wanted utilities to be reimbursed. The statute provides for utility reimbursement in District of Columbia urban renewal projects without regard to federal financial participation. The statute also provides for utility reimbursement in interstate highway improvements undertaken by the District of Columbia, thus satisfying the requirement of 23 U.S.C. 123(a), discussed in note 2, *supra*, to allow federal funds to be used for utility relocation.

these circumstances, the court of appeals cannot be said to have erred in following the Act's plain language.

2. The decision of the court below does not conflict with the decision of any other court of appeals or any state supreme court. *Consumers Power Co.* v. *Costle*, 615 F. 2d 1147 (6th Cir. 1980), cited by the district court (Pet. App. B-5), is distinguishable, because in that case there was no acquisition of real property but only an upgrading of the streets. 615 F. 2d at 1148-1149, 1150. *Artesian Water Co.* v. *Delaware Department of Highways & Transportation*, 330 A.2d 441 (Del.), aff'g in part 330 A.2d 432 (Del. Super. Ct. 1974), involved reimbursement of utilities under a different statute, 23 U.S.C. 123(a), concerning highway reconstruction. See note 2, *supra*. Although the state trial court in *Mountain States Telephone & Telegraph Co.* v. *Boise Redevelopment Agency*, No. 52891 (Idaho Dist. Ct. Oct. 27, 1980) (reprinted at Pet. App. C-1 to C-23), agreed with the district court below, that decision is pending on appeal before the Idaho Supreme Court (see amicus curiae brief filed by City of Boise, Idaho, at 1-2). *Pacific Telephone & Telegraph Co.* v. *Redevelopment Agency*, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68 (1978), also cited by petitioner (Pet. 13), construed a state statute. Should a conflict develop among the circuits or with a state supreme court, this Court can then consider whether it should decide the issue.

3. Although petitioner and the various amici argue that the reimbursement of utility removal expenses was not expected (despite the Act's plain language) and that this will upset settled expectations on the costs of projects regarding which additional funding is not available, that is an argument that should be directed to Congress. No judgment will be entered against petitioner until after the proceedings on remand are concluded. Thus, there is ample time for petitioner and its supporting amici to address their concerns to Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1982

DOJ-1982-11